James Capel (Far East) Ltd v YK Fung Securities Sdn Bhd (Tan Koon Swan, Third Party)

HIGH COURT (IPOH) — CIVIL SUIT NO 23-202-86
PEH SWEE CHIN FCJ
27 NOVEMBER 1995

Conflict of laws *— Contract — Proper law of contract — Contracts entered into between Malaysian firm and Singaporean firm — Proper law to be applied not stipulated — Test to be applied in determining proper law — Proper law to determine validity of contracts — Whether proper law Singaporean or Malaysian*

The defendants, a stockbroker firm in Ipoh, had directed the plaintiffs, a stockbroker firm in Singapore, to purchase shares in two companies listed on the Singapore Stock Exchange amounting to S$26,433,600 of which the Ipoh brokers had paid to account S$1,721,616.44. The plaintiffs claimed that the defendants did not accept delivery of the shares and sought payment of the balance of the purchase price. The defendants admitted that the S$1,721,616.44 had been paid to the account of the purchase price but contended that the agreements to purchase the shares had not been concluded or, if they had been concluded, the agreements were unlawful or unenforceable as the plaintiffs did not have a dealer's licence or, even if they had one, they had infringed its conditions. Consequently, it was argued, the plaintiffs had infringed s 9 of the Singapore Securities Industry Act 1973. The defendants counterclaimed for the amount paid to the plaintiffs. The issue before the court was the proper law of contract governing the share transactions in question. The defendants contended that the proper law was Singapore law, whilst the plaintiffs contended that it was Malaysian law.

Held, allowing the plaintiffs' claim and dismissing the defendants' counterclaim:

(1) Every international contract has a governing law, known as the proper law of contract, which determines the validity, interpretation, rights and obligations etc of such a contract. Where the parties to a contract have not made an express choice of the proper law to be applied, the court would have to find an implied choice to be inferred from the terms or form of contract or its surrounding circumstances, eg the presence of a choice of forum clause, the use of terminology peculiar to a system of law, and the currency in which money under the contract is expressed. If an implied choice is not found, the court would then adopt the system of law with which the transaction had the closest and most real connection, eg the place of performance of the contract, the place where the contract was made. In that regard the best test is the 'localization' or 'centre of gravity' approach, ie the law of the country where there is a clear preponderance of the above-

mentioned factors. Where there is no clear preponderance of such factors, the weight of each factor would have to be assessed, and in that respect the factor which carries the most weight is the locus solutionis of the contract, ie the place where the contract is to be performed (see pp 109F, H and 110B–D); *Bonython v Commonwealth of Australia* [1951] AC 201; *Citadel Insurance Co v Atlantic Union Insurance* [1982] 2 Lloyd's Rep 543; *James Miller & Partners Ltd v Whitworth St Estates (Manchester) Ltd* [1970] AC 583 followed.

(2) In the instant case, there was no express choice of any particular system of law, and from the evidence, there was no implied choice. There was, however, a preponderance of elements pointing to Malaysian law — the place where the contracts were made was Malaysia, and the place where they were to be performed, being the element which carried most weight, was also Malaysia. Thus, the proper law of contract governing the two contracts in question was Malaysian law (see pp 110I and 112C).

(3) The essential validity of a contract involving foreign elements is determined by the proper law of contract. Accordingly, in the present case, since the proper law was Malaysian law, the court need not deal with the allegations of breach of conditions of the plaintiffs' dealer's licence. In any event, for the same reason, even if there had been such breaches the court would ignore them (see p 113B).

[Bahasa Malaysia summary

Defendan, sebuah firma broker saham di Ipoh, telah mengarahkan plaintif, sebuah firma broker saham di Singapura, supaya membeli saham dalam dua buah syarikat yang disenaraikan atas Bursa Saham Singapura yang berjumlah S$26,443,600 dan broker Ipoh telah membayar sebanyak S$1,721,616.44. Plaintif berhujah bahawa defendan tidak menerima hantar-serah saham-saham itu dan meminta bayaran baki harga belian tersebut. Defendan mengakui bahawa S$1,721,616.44 itu telah dibayar ke akaun harga belian tetapi berhujah bahawa perjanjian untuk membeli saham-saham belum disempurnakan atau, jika pun telah disempurnakan, perjanjian-perjanjian tersebut adalah tidak sah atau tidak boleh dikuatkuasakan kerana plaintif tidak mempunyai satu lesen untuk menjalankan urusniaga atau, jikapun mereka mempunyai lesen tersebut, mereka telah melanggar syaratnya. Dengan itu, adalah dihujahkan bahawa s 9 Akta Perindustrian Sekuriti Singapura 1973 telah dilanggar oleh plaintif. Defendan menuntut balas untuk amaun yang telah dibayar kepada plaintif. Isu yang harus dipertimbangkan oleh mahkamah ialah apakah undang-undang wajar yang menguasai transaksi saham berkenaan. Defendan berhujah bahawa undang-undang wajar adalah undang-undang Singapura manakala plaintif berhujah bahawa ia adalah undang-undang Malaysia.

A **Diputuskan**, membenarkan tuntutan plaintif dan menolak tuntutan balas defendan:

(1) Setiap kontrak antarabangsa mempunyai undang-undang yang menguasainya, yang dikenali sebagai undang-undang wajar, yang menentukan kesahan, tafsiran, hak dan kewajipan dan lain-lain perkara kontrak demikian. Jika pihak-pihak kepada suatu kontrak tidak membuat pilihan yang nyata tentang undang-undang yang wajar dipakai, mahkamah harus mencari satu pilihan tersirat yang diinfer daripada terma atau bentuk kontrak atau keadaan sekelilingnya, misalnya kehadiran satu fasal pilihan forum, pemakaian istilah yang khusus kepada sesuatu sistem undang-undang dan mata wang yang wang di bawah kontrak itu dinyatakan. Jikalau pilihan tersirat tidak dijumpai, mahkamah seterusnya akan menerima-pakai sistem undang-undang yang transaksi itu mempunyai hubungan yang paling dekat dan sejati, misalnya tempat pelaksanaan kontrak, tempat di mana kontrak telah diikat. Dalam hal itu, ujian yang paling baik adalah pendekatan 'lokasi' atau 'pusat graviti', iaitu undang-undang negara di mana jelas terdapat banyak faktor-faktor tersebut. Jika adalah tidak jelas bahawa terdapat banyak faktor-faktor begitu, kepentingan setiap faktor harus ditaksir, dan dari segi itu faktor yang paling berpengaruh adalah locus solutionis kontrak itu, iaitu tempat di mana kontrak akan dilaksanakan (lihat ms 109F, H dan 110B–D); *Bonython v Commonwealth of Australia* [1951] AC 201; *Citadel Insurance Co v Atlantic Union Insurance* [1982] 2 Lloyd's Rep 543; *James Miller & Partners Ltd v Whitworth St Estates (Manchester) Ltd* [1970] AC 583 diikut.

(2) Dalam kes ini, tidak terdapat pilihan nyata tentang sebarang sistem undang-undang yang khusus, dan daripada keterangan, tidak terdapat pilihan tersirat. Namun demikian, terdapat banyak unsur-unsur yang menunjuk kepada undang-undang Malaysia — tempat di mana kontrak-kontrak telah diikat adalah Malaysia, dan tempat di mana kontrak-kontrak tersebut akan dilaksanakan, yang merupakan unsur yang paling berpengaruh, juga adalah Malaysia. Justeru itu, undang-undang wajar yang menguasai kedua-dua kontrak berkenaan adalah undang-undang Malaysia (lihat ms 110I dan 112C).

(3) Kesahan asas sesuatu kontrak yang membabitkan unsur-unsur asing adalah ditentukan oleh undang-undang kontrak wajar. Ekoran itu, dalam kes ini, oleh kerana undang-undang wajar adalah undang-undang Malaysia, mahkamah tidak perlu membicarakan pengataan kemungkiran syarat lesen untuk menjalankan urusniaga plaintif. Bagaimanapun, atas alasan yang sama, sekalipun terdapat kemungkiran demikian, mahkamah tidak akan mempedulikannya (lihat ms 113B).]

[*Editorial Note*: The defendants have appealed to the Court of Appeal vide Civil Appeal No A–02–773–95.]

Notes

For cases on the proper law of contract, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 588, 592–593.

Cases referred to

Amin Rasheed Shipping Corp v Kuwait Insurance Co [1984] AC 50
Attorney General for Alberta v Huggard Assets Ltd [1953] AC 420
Bonython v Commonwealth of Australia [1951] AC 201
Citadel Insurance Co v Atlantic Union Insurance [1982] 2 Lloyd's Rep 543
Entores v Miles Far East Corp [1955] 2 QB 327
Golden Acres Ltd v Queensland Estates (1989) QLR 378
Hwang Francis v Hwang & Yussof Securities [1992] 2 MLJ 379
James Miller & Partners Ltd v Whitworth St Estates (Manchester) Ltd [1970] AC 583
Mihalis Angelos, The [1970] 3 All ER 125
Theresa Chong v Kin Khoon & Co [1976] 2 MLJ 253

Legislation referred to

Sale of Goods Act 1957 s 36
Securities Industry Act 1973 ss 9, 34 [Singapore]
Securities Industry Regulations 1973 reg 19 [Singapore]

N Chandran (Adnan Sundra & Low) for the plaintiffs.
Chan Kok Keong, James Chin & John Lam (Chan & Associates) for the defendants.

Cur Adv Vult

Peh Swee Chin FCJ: This action concerns international contracts or rather contracts involving foreign elements which would require the court to determine the proper law of contract that should govern them. As a matter of fact, the court deals with two firms of stockbrokers, one in Singapore and the other in Ipoh, Perak. Evidence and submissions finally concluded on 26 May 1995, after a very long but intermittent case in a claim for the balance of the price of sale of certain shares to the Ipoh brokers by the Singapore brokers as per buying orders of the Ipoh brokers.

On or about 20 May 1985, according to paras 4–6 of the statement of claim, Mr Phillip Fung of YK Fung Securities Sdn Bhd, the Ipoh firm of stockbrokers ('the Ipoh brokers'), phoned one Mr Lau Wai Kok of James Capel (Far East) Ltd, the other firm of stockbrokers in Singapore ('the Singapore brokers') to buy six million shares in Grand United Holdings Bhd, a company listed on the Singapore Stock Exchange, for the sum of S$10,440,000 for delivery of the shares on 21 November 1985 (see paras 4–5 of the statement of claim).

According to the Ipoh brokers, vide para 2 of the amended defence and counterclaim, while admitting the existence of a 'bargain confirmation slip' dated 20 May 1985 and receiving a letter from the Singapore brokers

dated 14 June 1985, they deny that the agreement to buy the shares in question was ever concluded; or if concluded, the agreement to buy the said shares was unlawful and/or unenforceable for infringing s 9 of the Securities Industry Act 1973 of Singapore for not having a dealer's licence, or infringing conditions of such licence if the plaintiffs had one.

Again, according to the Singapore brokers, on or about 11 June 1985, according to paras 7–9 of the statement of claim of the Singapore brokers the Ipoh brokers agreed to buy, and the Singapore brokers agreed to sell, 5.8 million shares in Growth Industrial Holdings Ltd — a company listed on the Singapore Stock Exchange — for S$15,993,600 to be paid on 11 December 1985 for delivery of the shares to the Ipoh brokers on the same date.

By para 3 of the amended defence and counterclaim, the Ipoh brokers admit the existence of a bargain confirmation slip dated 11 June 1985 and a letter from the Singapore brokers dated 14 June 1985 and again plead that the agreement was not concluded, or if concluded, was unenforceable and/or unlawful for the same reasons as stated above in reference to the agreement to buy shares in Grand United Holdings Bhd, (Grand United Holdings Bhd and Growth Industrial Holdings Ltd are hereinafter called 'GUH' and 'GIH' respectively).

According to the Singapore brokers, the total purchase price payable for the GUH and GIH shares was S$26,433,600 of which the Ipoh brokers have paid to account S$1,721,616.44 leaving a balance of S$24,711,983.56; and further that the Ipoh brokers have refused to accept delivery of the GUH and GIH shares. They further say, by para 12 of the statement of claim, that they will give credit for any money arising from the resale of any of the shares between the date of the statement of claim (ie 28 May 1986) and the date of judgment. They, therefore, claim the balance sum of S$24,711,983.56 or such sum as may be due as on the date of the judgment, damages for breach of contract, interest and costs.

According to the Ipoh brokers, they admit that a total sum of S$1,721,616.44 was paid by them to account of the purchase price, but they say they have paid under unlawful or unenforceable contracts, or under a mistake of fact and they counterclaim for this sum, while asking the court to dismiss the claim of the Singapore brokers for various grounds mentioned in the amended defence and counterclaim.

I set out the bargain confirmation slip referred to by the Ipoh brokers below:

James Capel (Far East) Ltd
4 Raffles Quay #05–00 Finlayson House
Singapore 0104

YK Fung Securities Sdn Bhd
65 Clarke Street
Ipoh
Malaysia

For the account of: Date: 20 May 1985

Dear Sirs

BARGAIN CONFIRMATION

We hereby confirm that we/our agents have today BOUGHT for your account the following

Ref	Quantity	Stock	Price	Settlement	Net consideration
	6,000,000	GRAND UNITED HOLDINGS	S$1.74 nett	21 November 1985	S$10,440,000

You will receive a contract note in due course.

Consideration
Transfer stamp
Contract stamp
Commission
CS1 Levy

Total

Yours faithfully

—Sgd—
for James Capel (Far East) Ltd

Please note that this transaction is subject to the rules, regulations and customs of the stock exchange where the bargain was executed.

YK Fung Securities Sdn Bhd
65 Clarke Street
Ipoh
Malaysia

For the account of: Date: 11 June 1985

Dear Sirs

BARGAIN CONFIRMATION

We hereby confirm that we/our agents have today BOUGHT for your account the following:

Ref	Quantity	Stock	Price	Settlement	Net consideration
	5,880,000	GROWTH INDUSTRIAL	S$2.72 nett	11 December 1985	S$15,993,600

HOLDINGS

You will receive a contract note in due course.

Consideration
Transfer stamp
Contract stamp
Commission
CS1 Levy

Total

Yours faithfully

—Sgd—
for James Capel (Far East) Ltd

Please note that this transaction is subject to the rules, regulations and customs of the stock exchange where the bargain was executed.

I also set out below two letters from the Singapore brokers dated 14 June 1985 addressed to the Ipoh brokers and two letters dated 14 June 1985 and 24 June 1985 from the Ipoh brokers to the Singapore brokers:

James Capel (Far East) Ltd
20 Collyer Quay #11–01, Tung Centre
Singapore 0104

14 June 1985

YK Fung Securities Sdn Bhd
65 Clarke Street
Ipoh
Malaysia
Attn: Mr Phillip Fung

Dear Sirs

Re: Terms and conditions for the purchase of six million shares in Grand United Holdings Bhd at Sin$1.74 per share

We refer to the agreement between yourself and our Mr Lau Wai Kwok regarding the above-mentioned matter.

We state below the terms and conditions in regard to the purchase by you from us of six million shares in Grand United Holdings Bhd at Sin$1.74 per share.

1 The delivery date of the shares will be on 21 November 1985.

2 The full consideration for the total shares purchased, as aforesaid, amounting to Sin$10,440,000 will be paid to us on 21 November 1985.

3 The transaction is on a cum-all basis whereby all entitlement received by us will be for your account. In the event of a rights issue during the period of contract, you will undertake to provide the necessary fund for the rights issue. If the rights issue funds are not received by us in adequate time for the application, we reserve the right to renounce the rights entitlement or to apply to the rights issue which will then be for our own account, and you shall have no claims of whatsoever kind.

4 As the purchase contract is on a time-bargain basis, you will accept delivery of the shares and make payment for same notwithstanding any restructuring or suspension of the shares during the period of the contract or at time of delivery.

Kindly confirm the above-mentioned terms and conditions agreed upon by signing the duplicate copy of this letter and returning it to us.

Please note that the terms and conditions of the Stock Exchange of Singapore Ltd shall apply to this contract so long as there is nothing inconsistent therewith and the terms herein stated.

Dated this 14 June 1985.

Yours faithfully
James Capel (Far East) Ltd

—Sgd—
Lau Wai Kwok
Associate Director

We hereby agree to the above terms and conditions for and on behalf of YK Fung Securities Sdn Bhd

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14 June 1985

YK Fung Securities Sdn Bhd
65 Clarke Street
Ipoh
Malaysia
Attn: Mr Phillip Fung

Dear Sirs

Re: Terms and conditions for the purchase of 5.88 million shares in Growth Industrial Holdings Ltd at Sin$2.72 per share

We refer to the agreement between yourself and our Mr Lau Wai Kwok regarding the above-mentioned matter.

We state below the terms and conditions in regard to the purchase by you from us of 5.88 million shares in Growth Industrial Holdings Ltd at Sin$2.72 per share.

1 The delivery date of the shares will be on 11 December 1985.

2 The full consideration for the total shares purchased, as aforesaid, amounting to Sin$15,993,600 will be paid to us on 11 December 1985.

3 The transaction is on a cum-all basis whereby all entitlement received by us will be for your account. In the event of a rights issue during the period of contract, you will undertake to provide the necessary fund for the rights issue. If the rights issue funds are not received by us in adequate time for the application, we reserve the right to renounce the rights entitlement or to apply for the rights issue which will then be for our own account, and you shall have no claims of whatsoever kind.

4 As the purchase contract is on a term-bargain basis, you will accept delivery of the shares and make payment for same notwithstanding any restructuring or suspension of the shares during the period of the contract or at time of delivery.

Kindly confirm the above-mentioned terms and conditions agreed upon by signing the duplicate copy of this letter and returning it to us.

Please note that the terms and conditions of the Stock Exchange of Singapore Limited shall apply to this contract so long as there is nothing inconsistent therewith and the terms herein stated.

Dated this 14 June 1985.

Yours faithfully
James Capel (Far East) Ltd

—Sgd—
Lau Wai Kwok
Associate Director

We hereby agree to the above terms and conditions for and on behalf of YK Fung Securities Sdn Bhd

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YK Fung Securities Sdn Bhd
65 Clarke Street
Ipoh, Perak

Our Ref: JC/SK/nlh/39/4

14 June 1985

James Capel (Far East) Ltd
20 Collyer Quay #11-01
Tung Centre
Singapore 0104
Attn: Mr Lau Wai Kwok

Dear Sir

Re: Terms and conditions for the purchase of 5.88 million shares in Growth Industrial Holdings Ltd at Sin$2.72 per share

We state below the terms and conditions in regard to the purchase by us from you of 5.88 million shares in Growth Industrial Holdings Ltd at Sin$2.72 per share.

1 The delivery date of the shares will be on 11 December 1985.

2 The full consideration for the total shares purchased, as aforesaid, amounting to Sin$15,993,600 will be paid to you on 12 December 1985.

3 The transaction is on a cum-all basis whereby all entitlement received by you will be for our account. In the event of a rights issue during the period of contract, we will undertake to provide the necessary fund for the rights issue. If the rights issue funds are not received by you in adequate time for the application, you reserve the right to renounce the rights entitlement or to apply for the rights issue which will then be for your own account and we shall have no claims of whatsoever kind.

4 As the purchase contract is on a time-bargain basis, we will accept delivery of the shares and make payment for same notwithstanding any restructuring or suspension of the shares during the period of the contract or at time of delivery.

Kindly confirm the above-mentioned terms and conditions agreed upon by signing the duplicate copy of this letter and returning it to us.

Please note that the terms and conditions of the Kuala Lumpur Stock Exchange shall apply to this contract so long as there is nothing inconsistent therewith and the terms herein stated.

Dated this 14 June 1985.

Yours faithfully
YK Fung Securities Sdn Bhd

—Sgd—
Syed Khairuddin bin Syed Hasan
Managing Director

We hereby agree to the above terms and conditions for and on behalf of James Capel (Far East) Ltd

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Our Ref: JC/SK/nlh/37/3

24 June 1985

James Capel (Far East) Ltd
20 Collyer Quay #11-01
Tung Centre, Singapore 0104

Attn: Mr Lau Wai Kwok

Dear Sir

Re: Terms and conditions for the purchase of six million shares in Grand United Holdings Bhd at Sin$1.74 per share

A We state below the terms and conditions in regard to the purchase by us from you of six million shares in Grand United Holdings Bhd at Sin$1.74 per share.

1 The delivery date of the shares will be on 21 November 1985.

2 The full consideration for the total shares purchased, as aforesaid, amounting to Sin$10,440,000 will be paid to you on 22 November 1985.

3 The transaction is on a cum-all basis whereby all entitlement received by you will be for our account. In the event of a rights issue during the period of contract, we will undertake to provide the necessary fund for the rights issue. If the rights issue funds are not received by you in adequate time for the application, you reserve the right to renounce the rights entitlement or to apply for the rights issue which will then be for your own account, and we shall have no claims of whatsoever kind.

4 As the purchase contract is on a time-bargain basis, we will accept delivery of the shares and make payment for same notwithstanding any restructuring or suspension of the shares during the period of the contract or at time of delivery.

Kindly confirm the above-mentioned terms and conditions agreed upon by signing the duplicate copy of this letter and returning it to us.

Please note that the terms and conditions of the Kuala Lumpur Stock Exchange shall apply to this contract so long as there is nothing inconsistent therewith and the terms herein stated.

Yours faithfully
YK Fung Securities Sdn Bhd

—Sgd—
Syed Khairuddin bin Syed Hasan
Managing Director

We hereby agree to the above terms and conditions for and on behalf of James Capel (Far East) Ltd

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The statement of agreed facts of the parties, by paras 5–12, admits the two contracts, viz GUH and GIH contracts, with all the details therein. Paragraphs 5–12 are set out below:

The GUH Contract

5 On or about 20 May 1985, the plaintiffs and the defendants entered into a contract (hereinafter referred to as 'the GUH contract') whereby the plaintiffs agreed to accept 6,000,000 shares in Grand United Holdings Bhd (hereinafter referred to as 'the GUH shares') on 21 November 1985.

6 In consideration of the plaintiffs agreeing to deliver the GUH shares to the defendants on 21 November 1985, the defendants agreed to pay to the plaintiffs S$10,440,000.

7 The defendants did not accept delivery of the GUH shares and have not paid to the plaintiffs the sum or any part thereof in respect of the GUH contract, save the payments described in para 11 below.

The GIH Contract

8 On or about 11 June 1985 the plaintiffs and the defendants entered into a contract (hereinafter referred to as the 'GIH contract') whereby the plaintiffs agreed to deliver to the defendants and the defendants agreed to accept 5,880,000 shares in Growth Industrial Holdings Ltd (hereinafter referred to as 'the GIH shares') on 11 December 1985.

9 In consideration of the plaintiffs agreeing to deliver the GIH shares to the defendants on 11 December 1985, the defendants agreed to pay to the plaintiffs S$15,993,600.

10 The defendants did not accept delivery of the GIH shares and have not paid to the plaintiffs the sum, or any part thereof, in respect of the GIH contract.

11 The sum of S$26,433,600 was to be paid to the plaintiffs under the terms of the GUH contract and the GIH contract as follows:

(i) pursuant to the GUH contract	S$10,440,000
(ii) pursuant to the GIH contract	S$15,993,600
Total	S$26,433,600

12 The defendants have made payments to the plaintiffs of S$1,721,616.44 in respect of the GUH contract. The said payments were effected by a direct credit to the plaintiffs' account with Barclays Bank PLC, Singapore branch as follows:

Date of Payment	Amount
27 November 1985	S$1,291,433.49
29 November 1985	S$ 430,182.95
Total	S$1,721,616.44

Despite the rather evasive evidence of Mr Phillip Fung about some telephone conversation with Mr Lau Wai Kok from the Singapore brokers about some share dealing in May 1985 and the refusal of Mr Lau Wai Kok to give evidence — he having left the service of the Singapore brokers quite some time before the civil suit came up for hearing in open court — I am satisfied on the pleadings, the statement of agreed facts, the correspondence, the 'bargain confirmation' slips and the oral evidence in court giving clear though indirect support to the conclusion I am about to state, I find that the two agreements about the sale and buying of the GUH and GIH shares aforesaid were concluded contrary to the allegation of the Ipoh brokers.

The most pressing issue for this court to decide next is as to which is the proper law of contract governing these two contracts of buying and selling the GUH and GIH shares in question, because so much energy was directed to alleged infractions of Singapore law or statute.

A The contention of the Ipoh brokers is that Singapore law is the proper law for the following reasons.

For the Ipoh brokers, first, it was submitted that both parties agreed to be governed by the rules of the Singapore Stock Exchange. Secondly, the Singapore brokers operated on the Singapore Stock Exchange. Thirdly, B the Singapore brokers' dealer's licence referred to the Singapore Stock Exchange. Fourthly, the Singapore brokers' dealer's licence contemplated that the dealings of the Singapore brokers would be carried out through licensed dealers of the Singapore Stock Exchange. Fifthly, the Singapore brokers bought all the GUH and GIH shares (for the buying orders of the Ipoh brokers) from sellers who were either Singaporean or based in C Singapore. Sixthly, the payment was to be in Singapore dollars and seventhly, it was the task of this court to decide which was the proper law of contract.

It will have been seen that the emphasis of the Ipoh brokers is on shares to be paid for in Singapore dollars and to be acquired in Singapore D by the Singapore brokers who operated in Singapore.

On the other hand, it is the contention of the Singapore brokers that, first, the dealing of shares was to be in Malaysia, secondly the letters of the Ipoh brokers said that the rules of the Kuala Lumpur Stock Exchange applied and therefore Malaysian law is the proper law.

E The court now looks into this question of proper law of contract.

In a case like the present one involving these two contracts, foreign elements are involved, so that they are international contracts notwithstanding the narrow causeway separating Malaysia and Singapore.

Every international contract has a governing law which determines F the validity, interpretation, rights and obligations etc of such a contract. Such governing law is called the proper law of contract.

Now, if the parties to such a contract have stipulated for a proper law of contract or words giving the same effect then they have made an express choice of it.

G Where, however, they have not made such an express choice, then in my opinion, the proper law of contract will be according to the modern view as formulated by Lord Simonds in *Bonython v Commonwealth of Australia* [1951] AC 201 at p 209 in the Privy Council.

According to this case, in the absence of an express choice, the court H will have to find next if there is an implied choice which is the system of law by reference to which the contract was made, and such implied choice is to be inferred from the terms or form of contract or surrounding circumstances, some examples can be mentioned by way of illustration. For the purpose of this case, it suffices to mention a few examples such as: (a) presence of a choice of forum clause; (b) the use of a terminology or I concept peculiar to a system of law, such as the adoption of Lloyd's form in a schedule to England's Marine Insurance Act as in *Amin Rasheed Shipping Corp v Kuwait Insurance Co* [1984] AC 50; (c) where one party to a contract is government, as in the *Bonython* case itself; and (d) both sides carry on business or live in the same country.

None of the above factors is conclusive; a combination of factors may strengthen a finding of implied choice while if factors point to different directions, they may weaken such a finding.

If an implied choice is not so found, then the court adopts the system of law with which the transaction has the closest and most real connection. Examples of this are: (a) the place of performance of the contract; (b) the place where the contract was made; (c) the links of the parties of the contract to any particular countries; (d) the site of the immovable property if such property is involved; and (e) the currency in which money under the contract is expressed.

In implementing this approach of the closest and most real connection, the best test is the 'localization' or 'centre of gravity' approach as mentioned in *Citadel Insurance Co v Atlantic Union Insurance* [1982] 2 Lloyd's Rep 543 at pp 548–549 and attributed to Prof Cheshire. This approach means it is the law of the country in which factors similar to those mentioned above are most densely grouped; in other words, it is the law of the country where there is a clear preponderance of such factors.

Where there is no clear preponderance of such factors, one then begins to assess the weight of each of such factors. It is here that Lord Wilberforce said in *James Miller & Partners Ltd v Whitworth St Estates (Manchester) Ltd* [1970] AC 583 at p 615: 'If any single factor carries more weight in these matters than others, it is lex loci solutionis ...', ie the law of the place of performance of contract.

Before the court decides on the proper law in the case, this court would have to refer to the question of the illegality of the contracts, the main, if not the only, thrust of the defence; or the Ipoh brokers' case, ie to the relationship of illegality of contract in regard to the proper law of contract as follows.

Among the aspects of a contract which the proper law of contract determines, is the essential validity of contract in connection with the illegality of contract, as distinct from the formation or form of contract which need not be further discussed in this case. The proper law of contract would normally cover and determine the question of illegality or otherwise of the contract in question.

In other words, the general rule is that such essential validity is decided by the proper law of contract subject to few exceptions, which need not be dealt with in this case save that any of which may be mentioned where it is either relevant or helpful.

The court now turns to the factors or elements present in the instant case to determine which is the proper law of contract for these two share transactions in question.

It is evident that there was no stipulation for, or an express choice of, any particular system of law, so that the court considers the elements from the point of view of either an implied choice or the third approach of the closest and most real connection.

First, the correspondence set out above shows that both the Singapore and the Ipoh brokers stated that terms and conditions of the Singapore

Stock Exchange and Kuala Lumpur Stock Exchange respectively would apply to the contracts of GUH and GIH shares respectively, with the Singapore brokers quoting the Singapore Stock Exchange and the Ipoh brokers quoting the Kuala Lumpur Stock Exchange. Both firms have, at all material times, carried on the business in their respective countries of Singapore and Malaysia. Thus, the two elements tend to cancel out each other in each case. Thus, there no weight is to be put on either of the pans of the balance.

In this connection, it is interesting to state in passing by way of a deviation that rules of a stock exchange do not indicate really a system of law, such rules being 'by laws of a private body which has no force of law' as held by the Federal Court in *Theresa Chong v Kin Khoon & Co* [1976] 2 MLJ 253. Such by-laws, in the absence of an agreement to the contrary, determine the terms of contractual relationship in share transactions, see *Huang Chang Hsun Francis v Hwang & Yussof Securities Sdn Bhd* [1992] 2 MLJ 305. One must go back really to the business of ascertaining the proper law of contract.

Therefore, for evidence at this stage and looking inevitably ahead at other elements present, there is no implied choice of the system of law. The court moves into the third way, ie the system of law of the country with which the transactions have the closest and most real connection.

Another element which is relevant is that the currency in which money under these two contracts in question was expressed is 'Singapore dollars'; one point for Singapore law then.

Yet another element is the place of contract. The place where the two contracts were made was Ipoh, in the state of Perak; therefore, the locus contractus is Malaysia; one point for Malaysia. I cannot obviously pass off or somewhat gloss over this view without an explanation which is proffered below.

The general rule in this connection is that, the place where the contract is made is the place when an offeror receives the notification of acceptance of his offer from the offeree (in connection with rules of offer and acceptance as understood in our law of contract). This rule applies to all contracts, including where communications are instantaneous, such as when the contracting parties are in each other's presence or virtually in the presence of each other, as in the case of a contract made by telephone (see *Entores v Miles Far East Corp* [1955] 2 QB 327 (CA)). Here, it was not in dispute that there was a telephone conversation between Mr Lau Wai Kok and Mr Phillip Fung over the two contracts or dealing with these GUH and GIH shares in May 1985.

Speaking again of points in general, yet another element, and the element that carries most weight in the event of the absence of a preponderance of points in any country as stated earlier, is the place where the contract is to be performed, ie locus solutionis of a contract. The place of performance of these two contracts again is Ipoh, Perak in Malaysia for the following reasons, not forgetting thus that there is another point for Malaysian law.

Shares and stocks are goods within the definition of 'goods' in the Sale of Goods Act 1957. Place of performance of a contract of sale of goods is the place of delivery of such goods. Whether it is for a seller to send the goods to the buyer or for the buyer to take delivery of the goods from the seller is dependant on any contract, express or implied: see s 36 of the aforesaid Act. There was no express provision in the two contracts in question here, but there seems to be a prior agreement between the parties herein or an implied agreement by way of assumption of both parties that the Singapore brokers would deliver the GUH and GIH shares to the Ipoh brokers, as actually happened in this case when such delivery was refused in each case.

There is thus a preponderance, though by no means remarkable, of elements pointing to Malaysian law, bearing in mind in any event the most 'weighty' element of all in regard to locus solutionis, the court is of the view that the proper law of contract governing these two contracts in question is Malaysian law.

As stated before, the essential validity of an international contract is determined by its proper law. Thus the two contracts in relation to GUH and GIH shares are prima facie valid by Malaysian law unless such prima facie validity is found unsound from submission and evidence in this case.

First of all, it was submitted by learned counsel for the Ipoh brokers that irrespective of the proper law of contract, or that even if Malaysian law were such proper law, then if Malaysian law had the effect of allowing the Singapore brokers to evade Singapore law, then this court should not enforce the two contracts, and the rather unique Australian case of first instance, viz *Golden Acres Ltd v Queensland Estates* (1989) QLR 378 was relied on. This Australian case was a case where parties to a contract had made an express choice of Hong Kong law as the proper law. The court there on the facts came to the conclusion that the express choice of Hong Kong law was invalid because it was not bona fide. I mentioned its uniqueness because as far as is known, such point has never been decided in England. Of course, that case is not relevant and is out of place in our instant case, because the parties herein have never made an express choice of the proper law of contract, and then the even more remote question of bona fides as touching on an express choice does not arise at all. Citing of this case was more like a shot in the dark.

The court next deals with the alleged breaches of dealer's licence of the Singapore brokers. It was submitted that certain provisions of the Securities Industry Act 1973 of Singapore were breached in that, the telephone conversation between Mr Phillip Fung from the Ipoh brokers and Mr Lau Wai Kok from the Singapore brokers, being a share dealing, had not been done through members of the Singapore Stock Exchange, having regard to the definition of 'dealing in securities' in the Singapore Act. Various allegations of breach of condition of the licence of the Singapore brokers were made, and a great deal of expert evidence on such Singapore law was adduced. With respect to learned counsel, the necessity of dealing with all of them is removed by the finding of the proper law of

A contract being Malaysian law as stated earlier. I believe I need to make this very clear indeed once more.

Even accepting the submission and evidence advanced on behalf of the Singapore brokers for the sake of academic argument that there were breaches of the dealer's licence and of the Securities Industry Act 1973 of
B Singapore, this court would still ignore such breaches of such licence and of such foreign Act of Parliament from Singapore for the following reasons. First, the simple reason is that at common law, subject to very few exceptions, it is the proper law that determines the essential validity of a contract involving foreign elements, and Malaysian law is the proper law in this case.

C None of the aforesaid exceptions applies herein, though there is one which may be amenable to the arguments of the said submission and evidence but it does not apply. I have in mind the exception from the common law rule that this court will not enforce a contract or a contractual provision to the extent it is prohibited by lex loci solutionis, ie by the law
D of the country where the contract is to be performed. Lex loci solutionis for the two contracts of sale of shares is Malaysia law, as I have explained earlier.

Further, and in any event, a foreign statute, for that matter the Securities Industry Act 1973 of Singapore, does not have extra-territorial
E effect in Malaysia unless such an intention of the relevant Parliament is clearly expressed or could be so inevitably inferred. Thus, in *Attorney General for Alberta v Huggard Assets Ltd* [1953] AC 420, Lord Asquith stated in the Privy Council (at p 441):

> An Act of the Imperial Parliament today, unless it provides otherwise, applies
F to the whole of the United Kingdom and to nothing outside the United Kingdom: not even to the Channel Islands or the Isle of Man, let alone to a remote overseas colony or possession.

The Republic of Singapore is also a common law jurisdiction and she is not beyond the pale of this basic dictum.

G At the conclusion of the evidence and before final submissions were made by learned counsel, I believe I had informed them to the effect that any point of law or fact should be covered by the oral submission to be made, otherwise the court would not have regard to any point not so covered nor would it consider itself bound to offer any of its opinion on it. In this light, I would deal with the oral submission of learned counsel for
H the Ipoh brokers. This was to avoid having to deal with, without any clear legal submission, all those hurdles and sundry points which the Ipoh brokers poured into their pleadings in the beginning.

I must express my great appreciation of the experts on Singapore law for coming forward to enlighten the court on the various intricacies of
I Singapore law, viz Prof Walter Woon, Prof Latimer and Mr Lim Chor Pee. I was particularly impressed by the erudite and even-handed evidence of Prof Woon. In the event that has turned out, ie with the court concluding that Malaysian law as the proper law of contract, resort to their evidence is no longer necessary.

Before passing to other matters, there is one other matter which must be mentioned. It is the third party, Tan Koon Swan, involved in this case. The said third party had, until the conclusion of this case and right from the beginning: (a) been absent; (b) never been represented by counsel; (c) been an undischarged bankrupt; and (d) while being an undischarged bankrupt, no application of whatever kind had been made to the court to make him amenable to the court. No order will therefore be made in respect of him.

The defendants have a counterclaim for S$1,721,616.44 being 'money paid to the plaintiffs under an unlawful and/or unenforceable contract and/or mistake of fact', the sum being money paid to account of the two contracts of shares. The counterclaim stands or falls according to whether the Singapore brokers' claim would succeed or fail.

I now deal very briefly with some points of the Ipoh brokers that barely need a short mention here, the other points being matters which have had merely the effect of lengthening the hearing of this case.

First, on forward contracts, in the wake of the 'Pan El' crisis in the stock-markets of Singapore and Kuala Lumpur (that crisis was of sufficient notoriety to any court for taking judicial notice thereof), the KLSE issued a circular dated 5 December 1985:

THE KUALA LUMPUR STOCK EXCHANGE
MEMBERS' CIRCULAR NO 3426 OF 1985

Resumption of trading of all counters on
The Kuala Lumpur Stock Exchange

Further to the notices dated 2 and 3 December 1985, members are hereby advised that the committee members have resolved on the following:

(1) Trading on all counters will be resumed with effect from 10 am Thursday, 5 December 1985.

(2) Trading on all counters will only be on an 'IMMEDIATE DELIVERY BASIS' until further notice. Delivery must be made by 3 pm:

a) .....

b) .....

c) .....

(3) Trading on all counters on Delayed-One-Month (DIM) basis will be suspended until further notice.

(4) .....

(5) No contra deals are allowed.

(6) No off-market transactions are allowed.

(7) Forward contracts are strictly prohibited.

By Order Of The Committee Of
THE KUALA LUMPUR STOCK EXCHANGE
General Manager

Date: 5 December 1985

PW1, the 'company secretary' of the KLSE, in his evidence in July 1990, was emphatic to the effect that prior to the above circular, there was no prohibition (by the KLSE) on forward contracts. In December 1994, he was recalled by the Ipoh brokers for further cross-examination, and the same witness did a complete about-face by stating that prior to the above circular, the forward contracts were prohibited.

About forward contracts, which learned counsel seemed somewhat imperceptively to suggest some wrong-doing, if they do not offend against the rules about unlawful object or consideration of contracts, immorality, illegality of contracts etc, a court should not be swayed by certain nuances of any expression — such nuances are exquisite in the art and theatres. A court examines a transaction for its true legal effect.

Prior to the circular, there was nothing in the KLSE rules prohibiting such forward contracts. As a matter of fact, trading on 'delayed-one-month' basis which was also suspended by the above circular was, before the circular, allowed. A 'delayed-one-month' contract of KLSE was, in fact, an example of a forward contract.

The rubber and oil palm plantations too, mostly, if not all, indulge in forward contracts — otherwise, how else would one hear prices of rubber, palm oil, cocoa be announced by radio and television for the coming or future months everyday? After the above circular, forward contracts transacted through the KLSE were prohibited; it goes without saying the other commercial sectors were not bound by the KLSE 'home' rules.

The Ipoh brokers also submitted on roll-over, which was 'an illegal scheme of funding by Pan El's' directors, which the Singapore brokers knew or ought to have known, and it was suggested one Mr Tan Koon Swan, the cited third party, was something like a master-mind for all this. Selling shares for a lot of people is, to use the legalistic submissions of the learned counsel for the Ipoh brokers, a scheme of funding. If a person has some quoted shares, and needing money, sells some of the shares for raising the money, he is doing a 'funding scheme'. So much mountain has been made out of a molehill while all the time, Mr Tan Koon Swan, who has been well and alive, alleged to be responsible, had never been called as a witness by the Ipoh brokers.

Next, it was argued that the Singapore brokers were engaged in creating artificial share transactions. This submission was really incomprehensible, and when the Singapore brokers tendered the shares ordered by the Ipoh brokers, the Ipoh brokers refused to accept the same; not having the money to pay in full for the shares, were they artificial share transactions indeed? Evidence was adduced that the shares were acquired by the Singapore brokers from various sources to fulfill the orders of the Ipoh brokers.

The court would not depart from the greatest possible wide-ranging pleadings and submission originally of learned counsel for the Ipoh brokers without mentioning the case of *The Mihalis Angelos* [1970] 3 All ER 125, which was repeatedly stressed for the Ipoh brokers. If I may summarize it, the case seems to give rise to the principle that if a party to a contract terminates it for a wrong reason (a charterparty in the cited case), the damages payable would be reduced to nominal damages when there are

circumstances which would have entitled the 'terminator' to terminate the contract rightly.

This case was cited to support the contention of the Ipoh brokers that they would have been entitled to rescind the two contracts of purchase of shares by virtue of s 34 of Singapore's Securities Industry Act 1973 and reg 19 of Singapore's Securities Industry Regulations 1973. The said section and the said regulation gave the purchaser of shares 'to rescind the contract of purchase' within seven days after the receipt of the contract note. The Ipoh brokers, in the middle of the case, applied to amend (fourth application for amendment of pleading) by including the pleas of the section and the regulation of this Singapore statute. The court had refused the application for such specific amendment and the refusal was upheld by the Supreme Court in Civil Appeal No 02–505–91. The order of refusal was dealt with by this court in [1963] 1 CLJ 416.

To plead the point after the decision of the Supreme Court is an abuse of process with respect to the learned counsel. In any event, the Singapore brokers did not adduce evidence to ask for damages in addition to the claim for balance of price of the goods (the shares), so that the emphasis on *The Milhalis Angelos* gave one such a sense of dismay.

I find, therefore, that there is no reason why the claim of the Singapore brokers for the balance of the purchase price of the two contracts of shares in question should be disallowed, they having proved their claim.

I therefore give judgment as follows:

(1) that the defendants do pay the plaintiffs, within one month from today, the sum of S$24,711,983.56 with interest at 8% per annum from today till satisfaction;

(2) that the plaintiffs, on receiving the said sum of S$24,711,983.56 do deliver, within one further month thereafter, all valid and registrable transfers of all shares together with all the relevant share certificates in Grand United Holdings Bhd and Growth Industrial Holdings Ltd respectively, inclusive of all other shares accrued from any entitlement to any bonus issues, rights issues or all other issues flowing naturally from the original shares comprised in the two original contracts of shares in question;

(3) that the plaintiffs, on receiving the said sum of S$24,711,983.56 do, within one month thereafter, pay without any interest any proceeds of sale actually realized from the sale of any of the aforesaid shares in mitigation of their loss;

(4) that in the event of any dispute relating to the delivery of such transfer of such shares or such proceeds of sale as stated above, such dispute is to be resolved by a Senior Deputy Registrar of the High Court at Ipoh in an inquiry to be conducted as soon as possible viva voce and with any appeal therefrom to the judge in chambers under O 56 of the Rules of the High Court 1980;

(5) that the counterclaim of the defendants be dismissed;

A (6) that no order of whatever nature is made in respect of the third party herein;

(7) that the defendants do pay all costs to be taxed.

Order accordingly.

B Reported by Sally Kee Seok Meng

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